

United States District Court
Southern District of California

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.) Case No. 12-CR-0768 LAB
) Motion Hearing
VIRGINIA MADRID,)
)
Defendant.) Monday, June 8, 2015
)

Before the Honorable Larry A. Burns
United States District Judge

Appearances:

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Record produced by stenographic reporter

1 San Diego, California - Monday, June 8, 2015

2 (The defendant is not present.)

3 THE CLERK: Calling number 2 on the calendar,
4 12-CR-768, United States of America versus Virginia Madrid.
5 If counsel could state their appearance for the record.

6 MS. FERRARA: Good morning, your Honor. Jami
7 Ferrara on behalf of Ms. Madrid. She is not going to be
8 present.

9 THE COURT: Good morning, Ms. Ferrara.

10 MS. MCGRATH: Good morning, your Honor. Tara
11 McGrath for the United States.

12 THE COURT: Good morning, Ms. McGrath. I ruled on
13 a Rule 35 motion. I got a subsequent motion, joint motion,
14 from the parties to redact certain portions of what was said
15 in the Rule 35 motion. At this point I'm not prepared to do
16 that, and let me tell you what my thinking is on this.
17 First, it's very clear that the presumption of openness
18 applies to Rule 35 proceedings, not just the government's
19 application but the Court's ruling on that. There's a
20 specific case on point not cited in the papers that I
21 received, which is CBS v. U.S. District Court for the Central
22 District of California -- I don't know if either of you
23 looked at this -- 765 F.2d 823, Ninth Circuit, 1985. In this
24 case the Ninth Circuit holds in particular that Rule 35
25 proceedings are and should be open to the public, that they

1 are subject to the presumption of openness. Then Judge
2 Kennedy, now Justice Kennedy, writes as follows, that first,
3 the presumption that the public and press have a right of
4 access to criminal proceedings and documents filed therein
5 applies in a Rule 35 context. They say we find no principled
6 reason for affording greater confidentiality to post-trial
7 documents than to pretrial matters.

8 That being the case, they talk about the
9 presumption of openness, and they talk about the interest
10 that is necessary and must be shown in order to override the
11 presumption. They said that the interest which overrides the
12 presumption of open procedures must be specified with
13 particularity, and there must be findings that the closure
14 remedy is narrowly confined to protect the interests. Among
15 the things they say a judge must do before he seals a Rule 35
16 motion is look at other alternatives, and among the
17 alternatives he lists is participation in the Witness
18 Protection Program. Now, that's a pretty strong statement of
19 how strong the presumption is, that a judge should find out
20 about whether a witness is eligible for Witness Protection
21 Program as an alternative to sealing.

22 The interest -- the Ninth Circuit has called the
23 presumption of openness in these cases a very strong
24 presumption. Nondisclosure, quote, is strictly -- and may be
25 ordered only when it, quote, is strictly and inescapably

1 necessary, end quote, to protect a compelling interest. The
2 proponent of nondisclosure has to show that disclosure will
3 cause irreparable harm or some other compelling interest --
4 or that some other compelling interest is at stake, that
5 there's no alternative to nondisclosure that will adequately
6 protect the interest, and that nondisclosure will adequately
7 protect against the perceived harm.

8 There's one other thing that I think is at play in
9 this case, and that is that once information is made public,
10 once it's known, there's very little chance of overcoming the
11 presumption; republication of information that's already out
12 there rarely qualifies as a compelling need.

13 Here, I'm not positive on the facts, but it appears
14 the government says in their Rule 35, Ms. Madrid's
15 cooperation was made known to the person against whom she was
16 cooperating, who ultimately pled guilty.

17 MS. FERRARA: It was made known to the defendant in
18 that case --

19 THE COURT: Right.

20 MS. FERRARA: -- subject to a protective order. It
21 was not public.

22 THE COURT: Yeah.

23 MS. FERRARA: It was not publicized.

24 THE COURT: But the defendant knows about it,
25 right? What's to keep --

1 MS. FERRARA: He knows -- he knows that she was
2 going to cooperate, that she was cooperating against him,
3 but --

4 THE COURT: So what's to keep him from telling
5 other people that she's a cooperator, she's a snitch? Seems
6 like a big loophole here.

7 MS. FERRARA: Oh, sure, he could say that, your
8 Honor, but then he -- now he can also get your order and he
9 can distribute that to people, they can use that as paper
10 to --

11 THE COURT: So --

12 MS. FERRARA: -- harm her.

13 THE COURT: -- tell me what --

14 MS. FERRARA: It would have just been his word
15 before.

16 THE COURT: That's all hypothetical. And if, you
17 know, if you were right that that sufficed to meet the
18 showing necessary here, then in every case where there was
19 cooperation, there would have to be a sealed record, every
20 single one.

21 The requirement is more specific than that,
22 Ms. Ferrara. It says that the proponent of nondisclosure has
23 to show that it's strictly and inescapably necessary. I just
24 don't see that here because we have an open conduit to the
25 prison saying Ms. Madrid is a snitch and apparently nothing's

1 happened yet; I don't have anything in the application to me
2 that says she's been subject to recrimination or retaliation
3 or even threats of that. I mean there's nothing. There was
4 just this idea that well, if you cooperate -- and I
5 understand why there was that idea -- that if you cooperate,
6 you're going to be subject to some kind of physical harm.
7 There's no flesh on the bones here.

8 MS. FERRARA: I guess I'm a little confused, your
9 Honor. You have -- you have a policy that is unique to this
10 courtroom.

11 THE COURT: No, it's not.

12 MS. FERRARA: Okay. Well --

13 THE COURT: It shouldn't be if it is because I'm
14 reading from Ninth Circuit law, not unique to this courtroom.
15 I don't want to be marginalized like that.

16 MS. FERRARA: I'm sorry.

17 THE COURT: If others aren't following the Ninth
18 Circuit case law, then shame on them.

19 MS. FERRARA: Okay. That's fine. The only time
20 I've encountered this has been in your courtroom.

21 THE COURT: That's right because -- because we tend
22 to seal things willy-nilly and ignore these prohibitions on
23 sealing, that's why.

24 MS. FERRARA: Okay. So when we filed the -- when
25 the rule -- the 5K motion was filed, you told us that the

1 fact of Ms. Madrid's cooperation needed to be public but the
2 underlying facts, the reason why --

3 THE COURT: Right.

4 MS. FERRARA: -- were to be filed under seal --

5 THE COURT: I agree.

6 MS. FERRARA: -- which we complied with, which is
7 exactly what we did with the Rule 35 motion.

8 THE COURT: But there was an intervening --

9 MS. FERRARA: But then --

10 THE COURT: -- circumstance that --

11 MS. FERRARA: -- you filed an order and you --

12 THE COURT: There was an intervening --

13 MS. FERRARA: -- unsealed all of that information.

14 THE COURT: Ms. Ferrara, there was an intervening
15 circumstance that you're ignoring, which is that the object
16 of the cooperation -- the guy who was prosecuted -- was told
17 she's cooperating against you. And I assume that they were
18 given under Jencks everything that she said, all the reports
19 that laid out what was in the original submission to me.

20 That happened in between the two actions of mine that you

21 speak of. And once the cat was out of the bag, what

22 prohibits republication of the information? He knows now, he

23 knows, and he can tell anyone and everyone. He can have a

24 siren out there --

25 MS. FERRARA: But now he can use your order --

1 THE COURT: Pardon me?

2 MS. FERRARA: And now he can use your order to do
3 that. But apart from all that --

4 THE COURT: He could do it independent of my order?

5 MS. FERRARA: -- your Honor, you didn't even give
6 us an opportunity to be heard on it. You took information
7 that had previously been filed under seal and with no notice
8 to myself to give my client notice or to the government, you
9 published it, and you effectively unsealed it without giving
10 us an opportunity to respond. You unsealed information that
11 was ordered sealed by the Central District of California
12 without giving anybody any opportunity to respond.

13 THE COURT: They ordered -- they ordered that the
14 original 5K --

15 MS. FERRARA: I have a copy --

16 THE COURT: -- remain sealed?

17 MS. FERRARA: -- of the protective order.

18 THE COURT: No, but you're saying that they ordered
19 the information in our case be sealed?

20 MS. FERRARA: No, the information that she had
21 cooperated, the fact that she had -- that her identity had
22 been revealed in the information that was provided, which is
23 in essence the information that Ms. McGrath put in your
24 motion -- in our motion.

25 THE COURT: Okay. So let's -- let's cut to the

1 merits here. What information do I have that shows me that
2 sealing in this case of her status as a cooperator and my
3 characterization, for example, which you've suggested be
4 deleted, that she was probably the bigger fish turned on the
5 smaller fish? What information or evidence is there that's
6 strictly and inescapably necessary in order to protect some
7 compelling interest? I just don't see it. I haven't seen
8 anything that makes that case to me.

9 MS. FERRARA: Her safety is not a compelling
10 interest?

11 THE COURT: Is her safety implicated here? I mean,
12 as I said, the problem with the argument is it proves too
13 much. In every case where there's a 5K, you would say it
14 must be sealed because there's always a possibility that
15 there'd be some recrimination. I need something more than
16 that; otherwise, you know, these sealing procedures and this
17 standard means nothing.

18 MS. FERRARA: Well, you can -- you can file a
19 written order that says that you're denying a Rule 35 motion.
20 You don't have to put in all the facts of her cooperation.
21 That's -- we've asked for that to be redacted.

22 THE COURT: Well, you know, there's an interesting
23 point about that, and I cited it in -- and Mr. Hermansen's
24 here -- there's a case called U.S. v. Alcantara, 396 F.3d
25 189, 198-199. It's a Second Circuit case. Here's what the

1 Second Circuit case says about sentencing, adjustments in
2 sentencing law: The ability to see the application of the
3 sentencing laws in person is important to an informed public
4 debate over these laws. Observing the effect of the laws
5 that expand or contract the discretion of judges in imposing
6 sentences in individual cases may provide a valuable
7 prospective, end quote.

8 Now, that's a case where the argument was made at
9 the time of original sentencing, and I think the judge in
10 that case agreed with the parties about secrecy, there was a
11 challenge to that, and it was -- the practice was set aside.

12 But I'm mindful of the public debate going on now.
13 Three candidates by my count, three candidates who are
14 running for president, have talked about the specter of mass
15 incarceration of low-level offenders. And here there's a
16 significant difference in opinion about what ought to happen
17 to Ms. Madrid between me and the government. Here's a woman
18 who admitted that on six occasions she brought
19 methamphetamine in, a huge amount the last time. She admits
20 that for three years prior to being caught on this occasion,
21 she was running drug money on a weekly basis for a drug
22 organization making \$3,000 a run. Now, to me that's not a
23 low-level offender, and her incarceration couldn't reasonably
24 be characterized as a mass incarceration. As I said, there's
25 a public debate going on about this now.

1 The government thinks well, the measure of
2 punishment for someone who has cooperated with that
3 background is 69 months. I happen to disagree with that.
4 And I think it's important that anybody that looks at this
5 says well, here's the judge's perspective, here's the
6 government's perspective, and here's why the judge doesn't
7 think 69 months is a proper punishment in light of all the
8 sentencing factors.

9 MS. MCGRATH: Your Honor, I'm sorry. I need to
10 chime in just briefly on the record because I think what's
11 getting mixed up a little potentially is the Court denying
12 our order. The issue that the Court raises about Ms. Madrid
13 and her conduct, that's a totally separate point than what
14 was revealed in the public order; and what I want to make
15 sure that the record is clear on is that our Rule 35 motion,
16 the Court granted our sealing motion for the substance of
17 that Rule 35. Then, a short time later, approximately six
18 weeks later, after granting the sealing order on the factual
19 portion of that motion, the Court published an order
20 disclosing the sealed information without any notice to
21 either party. So while Ms. Ferrara and I may not agree with
22 what the Court's actual order was with regard to the Rule 35,
23 that's a whole separate issue about the disclosure.

24 And so what I also wanted to cite for the record is
25 that there -- none of the information that had been

1 previously ordered sealed -- the dates of her debriefs
2 that -- the substance, the detailed nature, the specific name
3 of the individual against whom she had cooperated -- none of
4 that was in the public record. It was absolutely disclosed
5 to him in the Central District case subject to a protective
6 order --

7 THE COURT: Well, what prevents him from telling
8 everybody and anybody that'll listen to him that Ms. Madrid
9 cooperated against me and I had go down on a 72-month drug
10 count because she snitched on me?

11 MS. MCGRATH: There's a --

12 THE COURT: What prevents that now?

13 MS. MCGRATH: There's an enormous difference
14 between his word and the word of this Court. What he says --

15 THE COURT: Well, what -- you didn't answer my
16 question, Ms. McGrath. What prevents him from telling anyone
17 and everyone who will listen that Ms. Madrid cooperated
18 against him and snitched on him?

19 MS. MCGRATH: Well, your Honor, he is subject to
20 the protective order, his counsel is subject to the
21 protective order. If he violates that, I don't know what
22 sanctions are available in the Central District, but I do
23 know that that order applied to his case. So I have to
24 assume that if he did that, he'd be in violation of that
25 order, and so, in theory, he shouldn't do that because he'd

1 be in violation of a court order up there.

2 But the credibility of that individual compared to
3 the credibility of the paper that Ms. Madrid now has hanging
4 off her tail everywhere she goes, it's in writing now that
5 Ms. Madrid cooperated, and it's in a court order, and that
6 paper tagging her for the rest of her -- and this Court knows
7 as well as I do what paper is to a defendant -- and that when
8 she shows up on a new yard, they --

9 THE COURT: I don't -- honestly, I don't know that
10 in every case. I understand the concern that arises, but I
11 have to tell you, in many of the declarations I read about
12 cooperation from your office, it doesn't seem like very
13 substantive cooperation: First name of a person, last name
14 unknown, Madrid's Tire Shop in Tijuana. A lot of times I'm
15 skeptical that Jose even exists or that there's a Madrid's
16 Tire Shop or had anything to do with anything, and --

17 MS. MCGRATH: As am I.

18 THE COURT: -- in short, the possibility of any
19 kind of recrimination is wholly illusory; it's all
20 speculation. And then to say okay, we're going to
21 automatically seal in every case because we're afraid of that
22 when there's been no showing that meets this very strict
23 standard for sealing, I just can't do that.

24 MS. MCGRATH: Well, your Honor -- and I share the
25 Court's speculation that those tire shops actually exist or

1 that, you know, the fictitious name actually was the
2 recruiter, but that's not the case here. Ms. Madrid gave
3 information that was actionable that led to an arrest of an
4 individual and his conviction and sentencing.

5 THE COURT: Okay. So the good point that both of
6 you make is that you probably should have had notice before I
7 changed course, which I acknowledge happened in this case. I
8 focused on the intervening event that I did not know that the
9 defendant was told, was revealed, she was moved to a
10 detention facility close by where she was supposed to testify
11 for seven months.

12 Here's what I'll do. I'm going to reseal the Rule
13 35. I'm going to withdraw the order, but I am not buying in
14 to all of the redactions that either of you have suggested.
15 And if you want to rewrite the opposition and tell me why
16 it's strictly and inescapably necessary that some of that
17 information not now be made public in light of the subsequent
18 developments, I'll reconsider that. But we'll return it to
19 the status quo. I commend you to look at the cases that I
20 mentioned because I'm going to follow that standard. And if
21 you can show me that there's some real possibility of harm to
22 her or recrimination, not just a hypothetical that applies in
23 every case where somebody cooperates, then that's a basis for
24 sealing and, you know, I'll use common sense about it; I'm
25 not going to be real strict about that. But here there's

1 just no specter of it. I mean he's been sentenced since
2 when, 2013?

3 MS. FERRARA: No --

4 MS. MCGRATH: No, he's just -- your Honor, that's
5 when the Rule 35 motion went in, and that's why it took so
6 long for the United States to put that --

7 THE COURT: When was he sentenced, this year?

8 MS. MCGRATH: He just got sentenced a week or two
9 before I submitted it, so I think I submitted it in April,
10 and I think he was sentenced in March.

11 THE COURT: All right. But I want you to look back
12 over that. I think that the revisions that both of you
13 recommend are -- are too great. I mean, for example, the
14 Court's characterization about her role in this? You know, I
15 do have the impression that big fish was set after a little
16 fish based on the information I had. Here's a person that
17 had a prior border smuggling felony, gets convicted a second
18 time, admits -- and it's not disputed in the probation
19 report -- as I said, that she'd done it six times before as
20 well as having been a drug money courier for three years
21 going into the getting caught on this thing; and then she
22 turns on a guy who has much less methamphetamine, there's no
23 indication that that guy has any record. And, you know, it
24 just seems to me like they're trolling, you know, for minnows
25 with a shark. Now, you get to do that, but, you know,

1 whether I give that great credit is another reason, another
2 story, and it points to the difference between my view and
3 the government's view, which I think is important for a
4 public to understand. So I'm not inclined to redact my own
5 characterizations of things.

6 Now, that's different from the information that's
7 contained in the debriefings, but -- I'd be interested to
8 know what was mentioned in -- what was the other fellow's
9 name, Eunice --

10 MS. MCGRATH: Your Honor, his name is David
11 Martinez. He was sentenced on April --

12 THE COURT: Martinez, yeah. Do you have a
13 transcript of the sentencing in his case?

14 MS. MCGRATH: I don't have that transcript, your
15 Honor. If the Court's interested in it, I could get it.

16 THE COURT: Well, I mean it may be helpful to you
17 in identifying why the interest here is strictly and
18 inescapably necessary and requires sealing and redacting of
19 information. I mean I'd want to know that if there was a --
20 as you pointed out, there was some effort to keep, you know,
21 her involvement secret. And Ms. Ferrara's point that
22 everybody's doing this doesn't give me any confidence that
23 the L.A. judge followed these standards either. I don't know
24 whether he or she did or didn't. But I'd have to be
25 convinced of that before I add, you know, a happy face and my

1 imprimatur to it.

2 MS. FERRARA: Your Honor -- and I apologize for
3 saying that everyone's doing it but you -- what I meant --

4 THE COURT: No, I think that's right. I think
5 you're right.

6 MS. FERRARA: But what I meant was we were
7 following the parameters that you had set out for us, and
8 then you changed the game in the middle --

9 THE COURT: You're right.

10 MS. FERRARA: -- and I didn't have any opportunity
11 to prepare my client --

12 THE COURT: You're right.

13 MS. FERRARA: -- that there's a nine-page document
14 out there --

15 THE COURT: I should have given notice. We'll
16 withdraw the order today, immediately.

17 MS. FERRARA: Thank you.

18 THE COURT: And nothing has been unsealed, I didn't
19 unseal the declaration at this point, so that will remain
20 sealed. But I want you in short order -- so I can, you know,
21 republish this -- to look at it, look at these cases, and
22 tell me what you think qualifies under this standard because
23 that's the standard that I'm going to follow, Ms. Ferrara.

24 MS. FERRARA: I understand.

25 MS. MCGRATH: We'll do that immediately, your

1 Honor. And just for the record, for the clarification for
2 the Court, he was sentenced in the Central District on
3 April 16th of 2015.

4 THE COURT: Okay. I mean it might help for you to
5 get a transcript and see what was said there; it might help
6 for you to pull the transcript in this case and see what was
7 said here. Do you have it? Do you have a transcript of Ms.
8 Madrid's --

9 MS. MCGRATH: I do believe that I have the
10 transcript of this case. I see, your Honor -- I'd have to
11 check. It was a while ago that she was sentenced before your
12 Honor, but --

13 THE COURT: Yeah.

14 MS. MCGRATH: -- the AUSA up there and I have had
15 many, many conversations about this case; I'm in frequent
16 contact with her, so while I haven't reviewed the transcript,
17 I am familiar with what took place at that proceeding.

18 THE COURT: I don't want to be reckless about this,
19 Ms. Ferrara. You know, if you can point to some fact that
20 indicates she's in, you know, some kind of jeopardy, then,
21 you know, I'll embrace that. But what I'm not willing to do
22 is just rubber stamp every one of these cases where there's
23 ostensible cooperation and say okay, you say there's
24 cooperation, that means everything's going to be sealed.
25 That's against the law.

1 MS. FERRARA: Your Honor -- and I do get that, but
2 the thing is is every case -- I mean if you just think about
3 the discovery process that we have in this district now, how
4 it has changed, how all of these big cases, our discovery is
5 governed by a protective order --

6 THE COURT: Right.

7 MS. FERRARA: -- because of the importance of
8 paper.

9 THE COURT: Right.

10 MS. FERRARA: I cannot print anything out in most
11 of my cases now and give it to my client for fear that that
12 paper is --

13 THE COURT: Right.

14 MS. FERRARA: -- going to be used to hurt my
15 client. So while I can stand here today and say I don't know
16 for sure if this is harming Ms. Madrid right now, but we
17 would have to say that every single day until she gets out of
18 custody --

19 THE COURT: No, I don't think so.

20 MS. FERRARA: -- that there's a nine-page written
21 order with information that you have disclosed --

22 THE COURT: You and I both know that there's cases
23 where the danger to an informant is manifest immediately --
24 I've seen those cases -- and we take special steps there.
25 And what am I to do about this suggestion that I have to

1 embrace all reasonable alternatives before sealing, including
2 participation in the Witness Protection Program? Now, that's
3 a pretty radical step, right? Turning to the government and
4 saying well, put her in the Witness Protection Program as an
5 alternative to sealing? That didn't come from me. That came
6 from former Judge now Justice Kennedy saying these are the
7 minimization steps that a judge must take before sealing. It
8 seems to me the presumption is pretty strong, it's pretty
9 strong. So I'm troubled by this.

10 I'll immediately withdraw the order. The sealing
11 has remained on the Rule 35 submission, which was kind of a
12 sloppy misstep by me. But you should be prepared to also
13 address, you know, what portion of that declaration in
14 support of it ought to be sealed and what should be unsealed.

15 There's two cases that I'll also call your
16 attention to that I think you should take a look at. These
17 are Fourth Circuit cases. Virginia Department of State
18 Police v. Washington Post, 386 F.3d 567 -- 386 F.3d 567 --
19 Fourth Circuit, 2004, and In Re: Charlotte Observer, 921 F.2d
20 47 at page 50, also Fourth Circuit, 1990. Both of those
21 cases say that where the information is known to the public,
22 once announced to the world, the information has lost its
23 secret characteristic and sealing is not indicated, can't
24 meet the standard. I'm a little concerned about that here.

25 MS. FERRARA: But that --

1 THE COURT: I get it he doesn't have a megaphone,
2 but the implications of your argument, Ms. Ferrara, is that,
3 you know, even the fact of the Rule 35 should not be known
4 because it indicates cooperation.

5 MS. FERRARA: I didn't say that though, your Honor,
6 but what you're saying --

7 THE COURT: Those are the implications though.

8 MS. FERRARA: -- you're saying that once the
9 information becomes public that you can't unring that bell?

10 THE COURT: Right.

11 MS. FERRARA: But you rang the bell without giving
12 us a chance --

13 THE COURT: I get that. That's why I'm --

14 MS. FERRARA: -- and so the fact that that
15 information is out there now is only because of your order,
16 your Honor.

17 THE COURT: That's why I'm doing what I'm doing and
18 withdrawing the order at this point, giving you both a chance
19 to tell me, you know, what portions of that order ought to be
20 redacted pursuant to this standard. But the implications --
21 I didn't say you argued this -- the implications of your
22 argument is even the fact of the Rule 35 should be sealed
23 because someone would deduce from that that she's cooperated
24 and then she'll be labeled a cooperator; or in the case of a
25 sentencing summary chart that indicates 5K, that that should

1 be always filed sealed because the fact of cooperation will
2 be known. I don't go that far. I don't think the cases go
3 that far.

4 MS. FERRARA: Just assuming arguendo right here
5 right now for this case, if I don't disagree with that, if
6 there's a motion or a sentencing summary chart that says
7 5K1.1, minus four, that does not give the information that
8 you are saying --

9 THE COURT: You're right. No, it doesn't.

10 MS. FERRARA: -- should be made public. So right
11 now, even before you file this order, say Mr. Martinez had
12 violated that protective order and he's out in the jails and
13 he's telling everybody "Virginia Madrid was going to
14 cooperate against me," nothing under all of the parameters
15 that we know of thus far, M.A. and all of that, no particular
16 damage could be done do to. Martinez (sic), no hit can be
17 ordered on her unless they have paper. They have a nine-page
18 court order --

19 THE COURT: How do we know that? I mean you're
20 saying the strength of his say-so is not enough to --

21 MS. FERRARA: The strength of his say-so is not
22 enough under all of these prison gangs that we talk about.
23 Everybody wants paper, your Honor. I have 1326 clients who
24 are emailing me and asking me to send them paper so they can
25 prove that they're not snitches. That's 1326s.

1 THE COURT: So you're -- but you're telling me that
2 if he's hooked up to some prison gang that can do harm to
3 her --

4 MS. FERRARA: -- without paper --

5 THE COURT: -- and he says look, I can tell you
6 first hand, I mean I'm the guy she's cooperating against,
7 this is why I had to plead, because I had reports showing
8 that she was going to snitch on me and I was told she'd been
9 moved to a facility --

10 MS. FERRARA: Didn't have the paper.

11 THE COURT: -- close to the jail or close to the
12 court where I was going to testify, she was there, and all I
13 -- the only thing I didn't see were the whites of her eyes,
14 you're saying that's not enough?

15 MS. FERRARA: He didn't have paper until you issued
16 that order.

17 THE COURT: Well, he must have had Jencks Act
18 material --

19 MS. FERRARA: It was under a protective order.

20 THE COURT: -- that the U.S. Attorney in -- pardon
21 me?

22 MS. FERRARA: It was under a protective order.

23 THE COURT: Oh, I know, but he had access --

24 MS. FERRARA: -- have a physical piece of paper --

25 THE COURT: -- he had access to it --

1 THE REPORTER: I'm sorry. I can't --

2 MS. FERRARA: I'm sorry.

3 THE COURT: Do you know whether he had access to
4 the reports of what she was saying about him?

5 MS. FERRARA: They were issued under protective
6 order, so his lawyer couldn't give them to him.

7 THE COURT: Oh, it was the lawyer's eyes only?

8 MS. FERRARA: No. The protective orders that we
9 have here say that I can show things to my client but I can't
10 physically give them the paper.

11 THE COURT: I got it.

12 MS. FERRARA: I assume that it's the same
13 protective order.

14 THE COURT: We don't know that though for sure,
15 right?

16 MS. FERRARA: Actually I do have the protective
17 order. Let me look.

18 THE COURT: Anyway, look, it's -- that's an
19 interesting side note. If that's the case, put it in your
20 renewed motion to me and I'll certainly take that into
21 consideration. Tish, make a note in the docket on this case
22 to immediately pull the Rule 35 order that I issued. Pull
23 that out of the docket. Everything else I think is still
24 status quo, right?

25 MS. FERRARA: Yes. Should we have a hearing date

1 for this?

2 THE COURT: Yeah, we probably should. There may
3 still be disagreement. I tell you what I won't do: I won't
4 publish another order until I run it by the two of you and
5 get your objections.

6 MS. MCGRATH: Thank you, your Honor.

7 MS. FERRARA: Thank you, your Honor.

8 THE COURT: So get your -- there's no time
9 sensitivity to this. Submit your -- I suppose it's going to
10 be a joint proposal unless the two of you disagree on how the
11 standard applies here, and then we'll have a hearing, and
12 I'll hear you out on those portions of it. I've indicated
13 some opposition to things that you've blanked out here.

14 MS. MCGRATH: And I heard that, your Honor. And
15 we'll meet this week and get that right back to the Court
16 immediately.

17 THE COURT: Okay. So as soon as I get those, we'll
18 schedule an order, and this is pulled as of this morning.

19 MS. MCGRATH: Thank you, your Honor.

20 MS. FERRARA: Could we just have little bit more
21 head's up for the hearing?

22 THE COURT: Yeah, sure. What do you want, two
23 weeks, something like that?

24 MS. FERRARA: Oh, no. I mean if we can schedule it
25 now, then we can file it or -- I mean your Honor scheduled

1 this hearing on Friday afternoon for this morning, and --

2 THE COURT: All right. How about a month from now?

3 MS. FERRARA: That's fine.

4 THE COURT: Tish, give them a date a month from now
5 at -- you want to do it at 2:00 instead of 9:30?

6 MS. FERRARA: Doesn't matter. Whatever works for
7 your calendar.

8 THE COURT: 2:00 is probably better for me.

9 MS. MCGRATH: Your Honor, if the first week of July
10 is available, that would work for me. I'm actually leaving
11 the district --

12 THE COURT: Yeah, I remember now. So the first
13 week of July, Tish? Does that work for you, Ms. Ferrara?

14 MS. FERRARA: July 6, is that what we're talking
15 about?

16 THE COURT: Does that work, July 6?

17 MS. MCGRATH: That's fine. Is that a Monday?

18 THE CLERK: Yes.

19 MS. MCGRATH: That's fine.

20 THE COURT: Okay. July 6 at 3:00.

21 MS. FERRARA: Thank you.

22 THE COURT: There's another case -- let me see if I
23 have a -- I have a Lexis cite for it. Mr. Hermansen is here,
24 and he's passing notes to you, and I think he's going to
25 appeal this, but take a look at Morales v. District Court for

1 the Southern District of California, 2015 Lexis 65564 -- it
2 was just issued May 19 -- 2015 Lexis 65564. Did you see it,
3 Mr. Hermansen?

4 MR. HERMANSEN: No. Is it yours?

5 THE COURT: Yeah, it's the preliminary order I
6 issued in -- when I got what you called a "Kurt" motion to
7 change the docket.

8 MR. HERMANSEN: Thanks a lot.

9 THE COURT: You called it that.

10 MR. HERMANSEN: No, I know. My motion was Kurt,
11 but you decided to send that to Lexis?

12 THE COURT: I didn't. They pick it up on their
13 own. Okay.

14 MS. FERRARA: Thank you, your Honor.

15 MS. MCGRATH: Thank you, your Honor.

16 (The proceedings were concluded.)
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Certificate of Reporter

I hereby certify that I am a duly appointed, qualified, and acting Official Court Reporter for the United States District Court; that the foregoing is a true and correct transcript of the proceedings had in the mentioned cause on the date or dates listed on the title page of the transcript; and that the format used herein complies with the rules and requirements of the United States Judicial Conference.

Dated June 16, 2015 at San Diego, California.

/s/ Debra M. Henson (electronic)
Debra M. Henson
Official Court Reporter